No. 87-1022

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, Individually and as Mayor of the City of New York, *et al.*,

Appellants,

v.

BEVERLY MORRIS, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPELLANTS' BRIEF OPPOSING MOTION TO AFFIRM

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PRELIMINARY STATEMENT

Pursuant to Rule 16.6 of the Rules of this Court, the municipal appellants and Robert Straniere submit this brief in opposition to the appellees' motion to affirm. For the reasons set forth below and in appellants' Jurisdictional Statement, the Court should deny appellees' motion, note probable jurisdiction, and order full briefing and oral argument on the merits.

ARGUMENT

THIS APPEAL PRESENTS SUBSTANTIAL QUESTIONS ON THE PROPER STANDARD FOR ASSESSING THE CONSTITUTIONALITY OF LIMITED-POWER REGIONAL GOVERNING BODIES, ON THE PROPER METHOD OF COMPUTING RELATIVE VOTING STRENGTH IN ELECTORAL BODIES THAT COMBINE A MAJORITY AT-LARGE MEMBERSHIP WITH A MINORITY MEMBERSHIP REPRESENTING CONSTITUENCIES OF DIFFERING SIZES AND WHETHER THE "LEAST RESTRICTIVE ALTERNATIVE" TEST APPLIES IN APPORTIONMENT CASES INVOLVING LOCAL GOVERNMENTS. IF LEFT UNDISTURBED, THE JUDGMENT BELOW WILL NECESSARILY LIMIT THE PREROGATIVES OF LOCAL GOVERNMENTS IN FORMULATING INNOVATIVE FORMS OF ELECTIVE REPRESENTATION.

Our jurisdictional statement established the need for plenary review of the judgments below, which threaten to dismantle the oldest and most effective governing body in New York City. We anticipated there most of the points raised by appellees' motion to affirm, and thus we do not repeat ourselves here. Two of appellees' points, each of which lacks merit, do merit a response.

I. The appointment of the Charter Revision Commission does not moot this appeal.

Appellees argue (Motion to Affirm at 17-18) that this Court should summarily affirm because a recently-appointed New York City Charter Revision Commission could render the appeal moot by altering the composition or voting structure of the Board of Estimate. This is a self-fulfilling prophecy. The Commission was created as a prudent response to the District Court's ruling that the Board's makeup violated the principle of one person, one vote—the very ruling that is the subject of this appeal. If that ruling be error, as our Jurisdictional Statement shows it to be, then no constitutional reason would exist for the Commission to propose changes in the Board's current design. Without the compulsion of the decision of the court below, the Charter Revision Commission would be free, if it chose, to recommend that the

Board's current design be maintained. Indeed, in the past, previous Commissions have examined the Board's role in City government—and have invariably concluded that compelling reasons warrant retention of the Board as constituted. For instance, after two years of comprehensive study, the 1975 Charter Revision Commission found:

> The nature of the Board of Estimate has been shaped by special needs which have arisen during particular times in the City's history. Specifically, it has been a magnet for issues that require deliberative judgments in the best interests of the City as a whole, and it has repeatedly been assigned responsibility for sensitive matters . . . that have not been adequately handled by other bodies or officials.
>
> Any Charter revision affecting the Board of Estimate cannot lose sight of this incremental assimilation of authority. The Board is not a body devised by esoteric social scientists, but rather an institution forged from the singular historical development and attributes of New York City and its distinct geographic parts.
>
> *Preliminary Recommendations of the State Charter Revision Commission for New York City* 84 (1975); *see also* N.Y.C. Charter Revision Commission, *Preliminary Report and Draft of Proposed Charter for the City of New York* 17 (1936).

The Board of Estimate's longstanding record as an effective instrument for governing our Nation's largest metropolis is not the only reason why the current Commission might be reluctant to alter the Board's makeup if this Court remedies the error below. Because portions of New York City are covered by section 5 of the Voting Rights Act of 1965, any change in the Board's makeup would inevitably raise issues under that Act. These issues, coupled with the Board's proven success as a governing body—success even appellees conceded below—may well lead the Commission to reaffirm its predecessors' views that the Board of Estimate, as constituted, should retain its historic role as a vital balance wheel for New York City government.

In short, that an erroneous ruling prompted the City to create a Commission to examine responses to that ruling is no reason to leave the error undisturbed—and certainly does not render this appeal moot. The resolution of this dispute upon plenary review is vital to the deliberations of that Commission. Probable jurisdiction should be noted.

II. A significant issue on this appeal is whether the federal judiciary may properly ignore the majority votes of the at-large members of an elective regional governing board in determining whether that board's voting structure comports with the one person, one vote component of the Equal Protection Clause.

Appellees argue (Motion to Affirm at 8, 26) that our appeal seeks to foist an "idiosyncratic, hybrid" mathematical analysis on the jurisprudence of one person, one vote and thereby eviscerate prior decisions of this Court. Appellees are wrong. In purporting to apply the principle of one person, one vote in this case, the courts below ignored a citizen's right to elect a majority of the Board's votes and focused instead only on a citizen's right to elect a minority of the Board. Our point is that it is impossible properly to apply the one person, one vote principle—it is impossible to determine whether discrimination between voters exists—without taking account of a citizen's right to vote for both the at-large and the borough members of the Board.

No previous decision of this Court has considered (let alone disposed of) that issue, and surely not *Avery* v. *Midland County*, 390 U.S. 474 (1968). That case involved a five-member county board in which 95% of the county's population lived in one of the four districts equally represented on the board; the one at-large member held only tie-breaking power. 390 U.S. at 476. The *Avery* Court held that such local governing bodies are subject to the equal protection clause. *Id.* at 478-81. In so holding, the Court did not address the relevance of the single at-large member to the one person, one vote analysis. Similarly, in none of the other cases on which appellees rely here (Motion to Affirm at 28-29) did the court explicitly address how an at-large membership

of a mixed-representation body should be treated for one person, one vote analysis, and none involved, as this case does, an elective body in which the at-large membership controls a majority of the votes. As Judge Newman stated in his concurring opinion below (JA49):

> Until today the only cases considering the constitutionality of representation arrangements that combine district representation with at-large representation have involved bodies in which the voting power of the at-large members was a small fraction of the total voting power. In most of these cases, there was only one at-large member (entitled to cast one vote), compared to several district representatives.

Thus, this case is one of first impression—and a crucial one for the future of substate governments. If, as appellees urge (Motion to Affirm at 29), it would be "untenable" to "amalgamate the at-large Board members into the mathematical analysis," it would be equally "untenable" to do so whether there were three, or ten, or 100 at-large members—an argument that not only leads to absurd results (JA51-52), but also could spell the end of at-large representation on local governing bodies.

Contrary to appellees' assertions (Motion to Affirm at 21-29), we do not urge that Professor Banzhaf's methodology must be used in analyzing the representation afforded to residents of the City's boroughs by their citywide representatives. Whatever the merits of the Banzhaf analysis of the Board of Estimate's voting structure, the analysis confirms what is intuitively apparent—that the deviation from mathematical equality is substantially decreased when the citywide votes are considered.[1] Upon remand, it may well be appropriate to use some other methodology to analyze the representation of the citywide representatives, but dissatisfaction with the methodology is not a permissible basis for excluding the majority citywide votes from the calculus and, thereby, analyzing a body which does exist.

It is the rulings of the courts below that are inconsistent with the dictates of *Avery*, in which this Court again affirmed that "the

1. The Banzhaf Index gives a maximum deviation of 30.8% (JA42).

Constitution and this Court are not roadblocks in the path of innovation, experiment and development among units of local government." 390 U.S. at 485. This recognition of the need for innovation on the local level requires that local or regional bodies like the Board be weighed on a more sensitive scale than that applied to state legislatures. *See Abate* v. *Mundt*, 403 U.S. 182, 185 (1971). An important factor to be considered here are the types of local issues resolved by the Board. The courts below have totally and irrationally blocked this "path of innovation" by analyzing the Board as if it contained only the borough or district members who hold a minority of the votes on the Board. This Court should note probable jurisdiction.

CONCLUSION

THIS COURT SHOULD DENY APPELLEES' MOTION TO AFFIRM AND NOTE PROBABLE JURISDICTION OF THE APPEAL.

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